JD-14-22
Louisville, KY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

REV-A-SHELF COMPANY, LLC

and **CASE 09-CA-270793**

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WTH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Sylvia Posey, Esq., for the General Counsel.
Jeffrey A. Calabrese, Esq. (Stoll Keenon Ogden PLLC),
Louisville, Kentucky, for the Respondent.
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Louisville, Kentucky, for the Charging Party.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, herein referred to as the Act, by failing and refusing to furnish the Union, or in one instance unreasonably delaying in furnishing, certain requested information relevant to and necessary for the performance of the Union's duties as exclusive bargaining representative. The Respondent did not violate the Act by refusing to furnish certain other requested information because these requests sought impermissible prearbitration discovery.

Procedural History

This case began on December 29, 2020, when the Union, General Drivers, Warehousemen and Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters filed an unfair labor practice charge against the Respondent, Rev-A-Shelf, LLC. National Labor Relations Board staff docketed the charge as Case 09–CA–270793.

After an investigation, the Regional Director for Region 9 of the Board issued a complaint and notice of hearing dated March 26, 2021. The Respondent filed a timely answer.

On September 22, 2021, a hearing opened before me by videoconference. The parties submitted a Joint Motion and Stipulation of Facts and Exhibits which included a waiver of the right to call witnesses and moved that the stipulation be received in lieu of testimony. I granted that motion, set a deadline for filing briefs and closed the hearing.[1]

The March 26, 2021, complaint and notice of hearing scheduled the hearing to open on June 28, 2021, but it was postponed until September 22, 2021. Respondent has not established that any further delay would be necessary and I conclude that the Respondent was not prejudiced by opening the hearing on that day. Further, I conclude that further delay would neither be appropriate nor effectuate the Act. Therefore, the Respondent's motions for a continuance and a stay are denied.

Both the General Counsel and the Respondent filed timely briefs, which have been carefully considered.

Jurisdiction

Based on the parties' stipulation and on the Respondent's answer to the complaint, I find that the charge was filed and served as alleged in the complaint.

The parties stipulated that at all material times the Respondent has been a limited liability company with an office and place of business in Louisville, Kentucky, and has been engaged in the manufacture and the nonretail sale of cabinet storage and organizational products. The parties also stipulated that during a 12-month period, the Respondent sold goods valued in excess of $50,000, and shipped those goods from its Louisville, Kentucky facility directly to points outside the Commonwealth of Kentucky.

The parties further stipulated that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I so conclude.[2]

Additionally, based on the parties' stipulation, I conclude that the Respondent satisfies the Board's discretionary standards for assertion of jurisdiction.

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1 A footnote in the Joint Motion noted that the Respondent "filed a motion for continuance, motion to stay, and motion to change location in this case on April 7, 2021. The parties agree that this joint motion moots the Company's motion to change location. The parties agree, however, that the Company's motion for continuance and motion to stay remain pending. By filing this joint motion, no party waives any position or argument taken with respect to those pending motions."

2 Based on the parties' stipulation, I also find that the Respondent's vice president of human resources, Christy Williams, and its Human Resources Manager, Robert Greenwell, are supervisors of the Respondent within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act.

The Union's Status

The parties stipulated that the Union is a labor organization within the meaning of Section 2(5) of the Act. I so find. Further, based on the parties' stipulation, I find that since on or before January 1, 1985, and at all times since, the Respondent has recognized the Union as the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the following unit of employees:

> All production employees, including truck drivers, employed by Respondent at its Louisville, Kentucky facility, but excluding all maintenance, mold shop, quality department, office/clerical professionals, guards, and supervisory employees as defined in the Act.

Additionally, I conclude that this unit is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act. Based on the parties' stipulation, I also find that this recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from December 18, 2018, to December 17, 2022. (For brevity, this 2018–2022 collective-bargaining agreement will be referred to simply as the agreement or the contract.)

Background Facts

The complaint alleges that the Union requested that the Respondent provide certain information relevant to performing its functions as exclusive bargaining representative, and necessary for that purpose. It further alleges that the Respondent unreasonably delayed in furnishing some parts of this requested information and has failed and refused to provide other parts. The Union sought this information in connection with a grievance it had filed and was taking to arbitration.

The Respondent conducts orientation meetings for new employees. In accordance with the collective-bargaining agreement, it affords a shop steward time to tell the new workers about the Union and the procedure for joining.

At orientation sessions in late July and early August 2020, the Union sought to have additional representatives, including a union business agent, present. The business agent stated that the purpose "was to provide training for the Union Steward."

The Respondent informed the Union that it "would agree to allow 1 union staff member to participate in the new employee orientation" to be held on July 31, 2020, and that if "the Union felt additional training was needed the Company would assist with providing a training room and time off for stewards to participate."

When the union business agent and 2 other union staff members showed up at the Respondent's facility on July 31, the Respondent let them attend the meeting on that day. However, on August 5, the Respondent's vice president of human resources and its human resources manager met with union representatives to discuss the matter. The human resources representatives offered

to allow one union representative, in addition to the shop steward, to attend an orientation session on August 6.

After this meeting, Business Agent Moore notified Human Resources Manager Greenwell which union staff member would be coming to the meeting. Nonetheless, on August 6, the union business agent arrived with 2 other staff members. When the Respondent refused to allow all 3 to attend the meeting, the Union filed a grievance.

On August 17, 2020, representatives of the Union and the Respondent met to discuss the grievance. On August 24, 2020, the Respondent informed the Union in writing that it was denying the grievance.

Issue Raised by the Grievance

The grievance reflects a clearcut disagreement between the Union and the Respondent concerning which provisions of the collective-bargaining agreement apply. The Respondent relies upon Article 4, Section 3, which states:

> The Company will allow a Union Steward (or designee) time during each new employee orientation process to inform employees of their right to join the Union. Union shall be responsible to collect and submit Union membership and Check Off forms.

However, the Union relies not only on this provision but also on the language in Article 27 which states:

> The Company agrees to permit designated and authorized representatives of the Union, access to the plant at reasonable times, for the purpose of handling legitimate Union business, relating to the administration of this Agreement; providing notice is given to the Company in advance, and providing such visits do not interfere with normal production.

On September 8, 2020, an arbitrator scheduled a hearing for December 10, 2020. Thereafter, both the Respondent and the Union requested information from the other party. The present unfair labor practice complaint concerns only what the Respondent provided, failed to provide, or unreasonably delayed in providing the Union.

The Respondent's Information Request

On September 22, 2020, the Respondent submitted an information request to the Union. The General Counsel does not allege that the Union's response violated the Act and I discuss it here only to provide background.

On October 19, 2020, the Union notified the Respondent and the arbitrator that it had retained counsel. On that same day, the Union's attorney sent the Respondent an email requesting

"a week extension to gather documents and resources." The email also stated, "We'll get you the info by no later than next Tuesday, October 27th." The Respondent agreed to this time frame.

About October 29, 2020, the Union emailed to the Respondent a 4-page letter providing some of the requested information. On November 3, 2020, the Respondent replied with a 6-page letter asserting that the Union's response was inadequate and describing the claimed deficiencies. The letter stated, "we respectfully request that your client cure these inadequacies by supplementing its responses within a reasonable time, but no later than November 13, 2020."

On November 13, 2020, the Union emailed the Respondent an 8-page letter. The first 6 pages addressed the Respondent's November 3 request for additional information. The letter concluded with an information request.

The Union's Information Request

Complaint paragraph 7(a) lists *some* of the items requested in the Union's November 13, 2020 letter, but not all of them. That is because the complaint only alleges that the Respondent violated the Act by a failure to furnish (or in some instances by an unreasonable delay in furnishing) some portions of the requested information. If the General Counsel does not allege that the response (or lack of response) to a particular item violated the Act, then that item is not listed in complaint paragraph 7(a).[3]

Therefore, if an item appears in the Union's November 13, 2020 request but is not listed in complaint paragraph 7(a), it may be that the General Counsel concluded either that this requested information was not relevant to the Union's duties or that it was not necessary for the performance of those duties. It also may be that the Respondent did furnish the Union with the information in a timely manner.

This decision, of course, focuses on the requested information specifically described in complaint paragraph 7(a) because the General Counsel does not allege that the Respondent violated the Act by failing to provide or unreasonably delaying before providing any other information.[4]

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3 To establish that the Respondent violated Section 8(a)(5) of the Act, the General Counsel must prove not only that the Respondent failed to provide (or unreasonably delayed in providing) information requested by the Union, but also that (1) this information was relevant to the Union's performance of its duties as exclusive bargaining representative and (2) that it was necessary for that purpose.

4 Arguably, it is possible to read complaint paragraph 7(a) to include all the information listed in the Union's November 13, 2020 information request because the complaint includes the entire request as "Attachment 1" and the complaint language referring to this attachment arguably is ambiguous. Specifically, complaint paragraph 7(a) alleges that "On about November 13, 2020, the Union, in writing, requested that Respondent furnish the following information, *as described on pages 7-8 of Attachment 1 hereto*." (Italics added.) However, in the context of the case as a whole, it appears clear that the General Counsel only intended to allege that the Respondent violated the Act by failing to provide the information specifically described in complaint subparagraphs 7(a)(ii), 7(a)(iii), 7(a)(iv), 7(a)(v), and 7(a)(vi), and by unreasonably delaying in providing the information specifically described in complaint subparagraphs 7(a)(i) and 7(a)(vii).

The Union's information request appears on pages 7 and 8 of the November 13, 2020 letter from the Union's attorney to the Respondent's counsel. This request lists the information sought in 10 numbered paragraphs. Subsequent correspondence between the parties refers to each numbered paragraph as if it were a separate request. For example, information described in paragraph 1 is referred to as "Request No. 1."

The parties' numbering does not correspond with the numbering in complaint paragraph 7(a) because the latter omits those portions of the information request which do not relate to an alleged violation. For clarity, this decision will refer to each item of requested information both by the complaint subparagraph number and, in brackets, the "request number" used by the parties.

Complaint paragraph 7(a) alleges, and the Respondent admits, that the Union, on about November 13, 2020, requested the following:

> (i) Any and all Company handbooks and policies, including but not limited to security and plant visitation policies. [Union Request No. 1]
>
> (ii) Any and all documents, information, and/or communications relating to Respondent's interpretation of Article 4 Section 3 of the Collective-Bargaining Agreement. [Union Request No. 4.]
>
> (iii) Any and all documents, information, and/or communications regarding Respondent's interpretation of Article 27 of the Collective-Bargaining Agreement. [Union Request No. 5.]
>
> (iv) Any and all Respondent representatives who were involved in the 2018 contract negotiations. [Union Request No. 6.]
>
> (v) Any and all transcripts, recordings, notes, or other documents memorializing any testimony, statements, or interviews given by any Respondent manager or supervisor relating to this grievance, including without limitation all witness statements or admissions by any party whether recorded, transcribed, paraphrased, handwritten or otherwise. [Union Request No. 7]
>
> (vi) All statements, notes, or witness [written[5]] communication made on July 23, 2020, July 30, 2020, July 31, 2020, August 5, 2020, and/or August 6, 2020 pertaining to the Union's respective visits to, or meeting(s) held at, the facility. [Union Request No. 8]
>
> (vii) For the past 3 years, please provide:

5 The Union's November 13, 2020, information request sought all "statements, notes, or *written* communication. . ." Paragraph 7(a)(vi) of the complaint alleges that the Union requested "all statements, notes, or *witness* communication. . ."

- A list of names of all employees who have attended each new employee orientation
- The date of each orientation
- Identify which steward(s) and/or Union agents(s) attended and/or presented
- Identify the Respondent representative present
- The Number of authorization cards that were signed.
- Any sign-in sheets or any other record(s) of attendance that may have been kept
- Any and all Respondent notes or communication from each orientation still in Respondent's possession. [Union Request No. 9.]

The complaint alleges that the Respondent unreasonably delayed in furnishing the Union with the Company handbooks and policies described in paragraph (i) above. Likewise, it alleges that the Respondent unreasonably delayed in providing the Union with the names of the Respondent's bargaining representatives, as described in paragraph (iv) above.

The General Counsel alleges that the Respondent has never provided the Union with any of the other information listed above.

Although the arbitrator later postponed the arbitration, on November 13, 2020, when the Union made its information request, the arbitration was on the calendar for December 10. In other words, the Union made the information request almost 4 weeks before the date set for the arbitration.

The Union's November 13 email asked the Respondent to furnish the requested information by November 23. However, the Respondent did not meet this 10-day time target.

Respondent's November 25, 2020, Reply

On November 16, 2020, the Respondent filed an unfair labor practice charge against the Union, alleging that the Union had violated the Act by failing to furnish information the Respondent had requested.[6] However, the Respondent did not reply to the Union's information request until November 25, when it sent a 4-page email to the Union's attorney. It began by objecting "to the Union's requests on the grounds that they are untimely and do not provide a sufficient amount of time for RAS [Rev-A-Shelf] to respond."

6 That charge is not part of the present proceeding, which concerns only the charge filed by the Union against the Respondent, and the complaint resulting from that charge.

Rather than proceeding immediately to the Union's information request, the email first described how long the Union had taken to reply to the Respondent's earlier information request. After noting that the Respondent had made its information request "about two and a half months before the scheduled arbitration hearing," the Respondent's email stated:

> RAS initially provided the Union with thirty days to respond to the requests and ultimately extended it an additional five days upon the Union's request, for a total of thirty-five days. The Union then actually took 37 days to respond and provided wholly inadequate and evasive responses. Even the purported 'supplemental' response, provided on November 13, was still woefully inadequate. All told, the Union took 52 days to produce virtually nothing.
>
> However, less than 1 month before the scheduled arbitration hearing, with the intervening Thanksgiving holiday and new COVID-19 restrictions to boot, the Union now deems it appropriate to provide RAS with 10 days to respond to the Union's requests. As the Union has already indicated and demonstrated, 10 days is an insufficient amount of time to respond to such requests. Therefore, to the extent that RAS has any relevant and non-privileged information responsive to the Union's requests, it will provide that information within 52 days, exclusive of intervening holidays, such as Thanksgiving, Christmas Eve, Christmas, New Year's Eve, and New Year's Day.

The Respondent's email then addressed the Union's information request item by item.

Complaint Paragraph 7(a)(i) [Union Request No. 1]

The Union had requested: "Any and all Company handbooks and policies, including but not limited to security and plant visitation policies." The Respondent's November 25, 2020, email addressed that request as follows:

> RAS objects to this request as vague, ambiguous, overbroad, unduly burdensome, and not reasonably limited in time or scope. RAS further objects on the grounds that the request seeks information not relevant to the present grievance. Subject to and without waiving the foregoing, RAS will respond on or before January 8, 2021.

Complaint Paragraphs 7(a)(ii) & 7(a)(iii) [Union Request Nos. 4 & 5]

The Union had sought: "Any and all documents, information, and/or communications relating to Respondent's interpretation of Article 4 Section 3 of the Collective-Bargaining Agreement." (Complaint paragraph 7(a)(ii) refers to this information.)

Likewise, the Union had requested: "Any and all documents, information, and/or communications regarding Respondent's interpretation of Article 27 of the Collective-Bargaining Agreement." (Complaint paragraph 7(a)(iii) refers to this information.) To each of these requests, the November 25, 2020 email provided the same reply:

> RAS objects to this request on the grounds that it calls for information protected by the attorney-client privilege, self-critical analysis privilege, internal investigative privilege, and work-product doctrine. RAS further objects on the grounds that the information requested is within the Union's own knowledge, possession, custody and control.

Complaint Paragraph 7(a)(iv) [Union Request No. 6]

The Union's November 13, 2020 email also had requested that the Respondent identify any and all of the Respondent's representatives who were involved in the 2018 contract negotiations. In response, the November 25, 2020 email stated:

> RAS objects to this request on the grounds that it is untimely and does not provide RAS sufficient time to respond. The information is also within the possession, custody, control, and knowledge of the Union. Subject to and without waiving the foregoing, RAS will respond on or before January 8, 2021.

Complaint Paragraphs 7(a)(v) & 7(a)(vi) [Union Request Nos. 7 & 8]

Request No. 7 in the Union's November 13, 2020 email asked Respondent to furnish the following: "Any and all transcripts, recordings, notes, or other documents memorializing any testimony, statements, or interviews given by any Respondent manager or supervisor relating to this grievance, including without limitation all witness statements or admissions by any party whether recorded, transcribed, paraphrased, handwritten or otherwise."

Request No. 8 sought the following: "All statements, notes, or written communication made on July 23, 2020, July 30, 2020, July 31, 2020, August 5, 2020, and/or August 6, 2020 pertaining to the Union's respective visits to, or meeting(s) held at, the facility."

For each of these two requests, the November 25, 2020 email provided an identical response. It stated:

> RAS objects to this request on the grounds that it calls for information protected by the attorney-client privilege, self-critical analysis privilege, internal investigative privilege, and work product doctrine.

Complaint Paragraph 7(a)(vii) [Union Request No. 9]

The Union also requested information concerning each of the new employee orientation sessions which the Respondent had conducted during the preceding 3 years. For each such orientation, the Union asked for the date of the meeting, a list of employees who attended and copies of the sign-in sheets or other records documenting such attendance, the name of the union steward and the names of any other union agents who attended the meeting, the name of the Respondent's representative who attended, how many union authorization cards were signed, and

any notes and communications regarding the meeting which the Respondent retained. The Respondent's November 25, 2020 email replied as follows:

> RAS objects to this request on the grounds that it is overly broad, unduly burdensome and not reasonably limited in time and scope. There have been over a hundred new employee orientations over the last three years. RAS further objects on the grounds that the request seeks information not relevant to the grievance. RAS also objects to this request on the grounds that the Union has this information within its knowledge, possession, custody and control. A Union Steward was present at new employee orientations since the Collective Bargaining Agreement in December 2018 and therefore has knowledge of the names of the employees who attended orientation, the date of orientation, the steward present, the Company representatives present, and the number of authorizations that were signed.

Arbitration Hearing Postponed

On November 30, 2020, the Respondent's counsel emailed to the arbitrator a request to depose 2 witnesses who were "unable to attend the hearing because of serious medical conditions." The Respondent also asked that the hearing be postponed to allow time to take the depositions.

This letter stated, "We have conferred with opposing counsel on the issue, and must report that the parties were unable to agree on this matter (although the Union does not object to a postponement of the hearing date, provided that it is not charged any fee for the change)."

On the same date, the Union's attorney emailed the arbitrator that "the Union is unwilling to agree to a video deposition of witnesses" and would only agree to a postponement of the hearing "if it is due to the medical condition of one of the company's essential witnesses." Noting the added expense of depositions, the union attorney proposed that the witnesses the Respondent wished to depose instead testify remotely.

Later that same day, the arbitrator responded to those emails with one which raised another problem. Because of the COVID-19 pandemic, the governor of Kentucky had issued an order limiting the number of people who could meet in one place. The arbitrator believed that this limitation would preclude an in-person hearing and suggested conducting the hearing "virtually," by videoconference.

Both the Union's counsel and the Respondent's attorney replied quickly. The Union's attorney agreed to a "virtual" hearing but the Respondent's counsel stated that the "company is not willing to do the hearing remotely." The arbitrator then canceled the December 10, 2020 hearing and offered the parties a choice of hearing dates in late February 2021.

Union's December 9, 2020 Reply

As discussed above, on November 25, 2020, the Respondent's counsel sent to the Union's attorney a reply to the Union's November 13, 2020 information request. On December 9, 2020, the Union's attorney replied to that reply.

Dispute About Time Allowed For Production

The Respondent's November 25 letter had begun by discussing its own, earlier information request for information and how long it waited for a reply. "All told," the Respondent had written, "the Union took 52 days to produce virtually nothing."

The Respondent apparently had reasoned that, because the Union had taken 52 days to provide information in response to its request, a 52-day period would be a reasonable length of time for its response to the Union's request. Thus, its November 25 letter had informed the Union that "to the extent that RAS has any relevant and non-privileged information responsive to the Union's requests, it will provide that information within 52 days, exclusive of intervening holidays, such as Thanksgiving, Christmas Eve, Christmas, New Year's Eve, and New Year's Day."

The Union regarded this 52-day time period as arbitrary and retaliatory. Its December 9 reply protested:

> [W]ithout attempting to find a mutually agreeable timeframe to provide the requested information, your unilateral decision to provide the requested information within 52 days on or before January 8, 2021 appears to be an arbitrary tit-for-tat declaration based on your mischaracterization of the Union's good faith efforts to provide and respond to the Company's prior information requests. Furthermore, many of your responses contain inaccurate statements regarding the Union's possession of information and assert unrecognized privileges that we request you clarify.

Dispute Over Particular Documents Requested

In its November 13 information request, the Union had listed various categories of documents which it sought. As discussed above, the Respondent's November 25 reply had first objected to the Union's time target for production, and then discussed the categories one-by-one.

The Union's December 9 reply followed this pattern, first addressing the Respondent's objection to the time frame and then proceeding to the individual categories of information it had requested. However, the Union's reply did not address, point-for-point, every assertion in the Respondent's November 25 email.

For example, the first item on the Union's November 13, 2020 information request had sought any and all company handbooks and policies. (Complaint paragraph 7(a)(i) refers to this "Union Request No. 1.") In its November 25, 2020 reply, the Respondent had answered that it

would reply on or before January 8, 2021. The Union's December 9 email did not take issue, specifically, with this answer.

Complaint Paragraphs 7(a)(ii), 7(a)(iii) & 7(a)(v) [Union Request Nos. 4, 5 & 7]

The Respondent's November 25 letter had provided identical responses to the Union's request for documents, information and/or communications relating to Article 4, Section 3 of the collective-bargaining agreement and to the Union's similar request for documents, information and/or communications relating to Article 27 of the contract.

In each instance, the Respondent had objected that these two requests called for information protected by the "attorney-client privilege, self-critical analysis period, internal investigative privilege, and work product doctrine."

The Respondent's November 25 letter had raised similar privilege and attorney work product objections to Request No. 7 in the Union's November 13 letter. The Union had sought "transcripts, recordings, notes, or other documents memorializing any testimony, statements, or interviews given by any Respondent manager or supervisor relating to this grievance, including without limitation all witness statements or admissions by any party whether recorded, transcribed, paraphrased, handwritten or otherwise."

The Union's December 9 letter gave an identical response to each of these assertions of privilege. That letter stated:

> Your objection is unavailing as the Company made the same exact request in its September 22, 2020 letter to the Union (see September 22, 2020 Company Request No. 4). To turnaround and assert that the Company has no obligation or is unable to provide the same information requested with respect to Company interpretation flies in the face of good faith bargaining.
>
> This request does not seek information protected by attorney-client privilege or work product doctrine. Further, the Union disputes the existence of the asserted self-critical privilege and internal investigative privilege, and is not aware of any Board precedent or arbitral authority recognizing such privileges. Please provide all responsive non-privileged information requested as well as legal authority for all asserted privileges, and explain why the Union was obligated to provide the same kind of information requested, while the Company is not.

Complaint Paragraph 7(a)(vi) [Union Request No. 8]

The Respondent's November 25 letter also had raised the same privilege and attorney work product objections to the Union's request for "statements, notes, or written communication made on July 23, 2020, July 30, 2020, July 31, 2020, August 5, 2020, and/or August 6, 2020 pertaining to the Union's respective visits to, or meeting(s) held at, the facility."

The Union's December 9 letter replied, using language similar to that quoted above, that it did not seek information protected by the attorney-client privilege or work product doctrine, and that it disputed the existence of the other asserted privileges.

Complaint Paragraph 7(a)(vii) [Union Request No. 9]

The Union's November 13 request also had sought information (described in complaint paragraph 7(a)(vii)) concerning the employee orientation meetings which the Respondent had conducted during the preceding 3 years. The Respondent's November 25 reply had objected that the request was overly burdensome and sought information irrelevant to the grievance. The November 25 reply also had stated that the Union already had this information because a union steward had been present at each of the meetings.

The Union's December 9 reply to the November 25 letter, citing court precedents, stated that a party claiming that an information request was unduly burdensome must show that complying with the request would seriously disrupt its normal business operations, and that "even a substantial time and money burden does not excuse duty to disclose." The letter asked the Respondent to "explain how compliance with this request would seriously disrupt normal business operations and provide supporting documentation."

The Union stated that it needed the information to determine whether the Respondent had departed from past practice when it refused to allow additional union representatives to attend the new employee orientation sessions. The Union asserted that "both parties should be able to examine the Company's practices over, at minimum, a three-year period, or the same duration of the parties' collective-bargaining agreement."

The Union's December 9 letter also denied that it already possessed the requested information.

Respondent's December 16, 2020 Reply

By letter dated December 16, 2020, the Respondent replied to the Union's December 9, 2020 letter. Again, it first addressed the time frame issue and then proceeded to the various categories of information requested.

Time Allowed for Furnishing Requested Information

The Respondent again asserted that the Union had not allowed sufficient time for the Respondent to produce the documents. Although the Union had made its November 13 request almost a month before the hearing, then scheduled for December 10, the Respondent stated, "the Union omits the fact that it only provided Rev-A-Shelf ('RAS') with ten days to respond." The Respondent further argued that the Union failed to take into account "the new COVID-19 restrictions put in place and the Thanksgiving holiday. . ."

The Respondent's November 25 email had referred to the earlier information request it had sent to the Union and the amount of time the Union had taken: "All told, the Union took 52 days to produce virtually nothing." Therefore, the Respondent said, it would provide the information requested by the Union "within 52 days, exclusive of intervening holidays, such as Thanksgiving, Christmas Eve, Christmas, New Year's Eve, and New Year's Day."

The Union's December 9 reply viewed the 52-day period as arbitrary and retaliatory, as "tit-for-tat." Not so, the Respondent insisted. Its December 16 letter stated:

> Moreover, the "unilateral decision" to provide the requested information within 52 days on or before January 8, 2021, was in fact not a unilateral decision and was previously recognized by the parties as timely for the Union's responses to RAS's requests. Therefore, RAS is simply utilizing the timeframe the Union previously agreed to, and in fact requested, for its good faith responses to the Union's requests.

The Respondent's December 16 letter did not specifically discuss Union Request No. 1 (complaint paragraph 7(a)(i)) or Union Request No. 6 (complaint paragraph 7(a)(iv)). It did address other portions of the Union's November 23, 2020 information request.

Dispute Over Asserted Privileges

In earlier correspondence, the Respondent had objected that four of the Union's information requests sought documents protected by various privileges. More specifically, the Respondent asserted that the documents described in Union Request Nos. 4, 5, 7 & 8 (complaint paragraphs 7(a)(ii), 7(a)(iii), 7(a)(v) and 7(a)(vi), respectively) fell within the scope of the attorney-client privilege, the attorney work product doctrine, the self-critical analysis privilege and the internal investigative privilege.

This earlier discussion had not been very productive, essentially consisting of the Respondent asserting claims of privilege and the Union denying that such privileges existed. The Respondent's December 16 letter continued that pattern, at least with respect to the assertions of attorney-client privilege and work product doctrine. The following portion of the December 16 letter concerns Union Request No. 4, but the letter provided almost identical responses with respect to Request Nos. 5 and 7, and a shorter but similar discussion about Request No. 8:

> RAS objected in good faith on the basis that the request seeks information protected by privilege and within the Union's own knowledge, possession, custody and control. Further, while your letter asserts that the request does not seek information protected by attorney-client privilege or work product doctrine, the language of the request indicates otherwise. Specifically, the request states: "Any and all documents, information, and/or communications regarding the Company's interpretation of Article 4 Section 3 of the Collective Bargaining Agreement." Inherently, this includes any notes or communications made between RAS and its counsel as well as notes or communications RAS's counsel directed it to make.

> Notwithstanding the objections of attorney-client privilege and work product doctrine, the self-critical analysis privilege and internal investigative privilege apply.

In its December 16 letter, the Respondent provided the following argument[7] to support its claim that a self-critical analysis privilege and an internal investigative privilege existed and applied:

> *See International Union of Elec., Radio & Mach. Workers*, 648 F.2d 18, 29 (D.C. Cir. 1980)("The interest a union might have in an employer's AAPs must be balanced with the desirability of confidential, frank self-analysis on the part of the employer. an employer's self-analysis, often including admissions and desirably candid self-criticism, is necessarily chilled by a foreknowledge that the results of that analysis must be disclosed to the union. . ."); *ASARCO, Inc. v. NLRB*, 805 F.2d 194, 200 (6th Cir. 1986)(recognizing self-critical analysis priv). Further, the internal investigative privilege applies because Courts have upheld a claim of privilege for statements by employees obtained in the course of an internal investigation where the communications were made at the direction of corporate superiors in order to secure legal advice from counsel. See *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.Complaint. Cir. 2014)("communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege").

The Union's December 9 email had stated that the Respondent's September 22, 2020 information request had asked the Union to provide the same type of information which Items 4 and 5 of the Union's request sought. The Union, reasoning that if it had to furnish such information then so would the Respondent, asked for an explanation concerning why the Respondent should be treated differently. The Respondent's December 16 letter stated:

> Because the Union and RAS possess different documents, information and/or communications, information and documents from one party may be privileged while information and documents from another party are not. Further, certain documents may be in one party's possession, custody and control, but not in the other party's possession custody and control.

Later, during the letter's discussion related to Union Request No. 7, Respondent added:

> Quite simply, just because one party's documents may be privileged does not lead to the conclusion that another party's documents are privileged. Therefore, RAS's

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7 This quoted material appears in the portion of Respondent's December 16, 2020 letter which discusses Union Request 3 (seeking the Respondent's bargaining notes and communications pertaining to the 2018 contract negotiations). The portions of the December 16 letter addressing Union Requests 4, 5, 7 and 8 refer to this discussion by stating "See Follow–up to Union Request No. 3." The complaint does not allege that the Respondent violated the Act by failing to provide (or by unreasonably delaying in providing) the documents described in Union Request 3.

request and the Union's response to that request do not preclude RAS's objections here.

Complaint Paragraph 7(a)(vii) [Union Request No. 9]

Union Request No. 9 sought information about new employee orientation meetings which the Respondent had conducted at any time during a 3-year period, including the names of the employees who attended each such meeting, the names of the steward and other union representatives who attended, the name of the management representative who attended, the Respondent's notes, and the number of authorization cards signed. The Respondent had objected that the request was unduly burdensome, sought information irrelevant to the grievance, and that it already possessed this information because a union steward had been present at each of these meetings.

The Union's December 9 reply had cited case precedent to support its argument that the request was not unduly burdensome. It also asserted that the information sought was relevant to the issue of whether the Respondent had a past practice of allowing more than one union representative to attend, and it denied that it already possessed the information.

The Respondent's December 16 letter cited case authority which distinguished the cases the Union had cited and to support its arguments that the Union's information request was unduly burdensome and overly broad. The Respondent also disputed that some of the information sought had any relevance to the grievance:

> The request is not "specifically targeted" and would not "directly assist the Union in the arbitration or assist them in identifying further evidence" because the names of the employees who attended each new employee orientation, the date of each orientation, the stewards who attended orientation, the company representatives present, the number of authorization cards that were signed, any sign in sheets or records of attendance, and any company notes have no relation to the grievance. As repeatedly explained, non-employee Union staff members did not attend new employee orientation except on July 23, 2020; July 30, 2020 and July 31, 2020 when the Union deceptively used the guise of training Union Stewards to attend new employee orientation. Consequently, the information request is overly broad.

The Union's December 9 letter had disputed the Respondent's assertion that the Union already possessed some of the information sought: "[N]ew employee orientations are Company (not Union) meetings and the Union has no notes or records in its possession reflecting the information requested." The Respondent without December 16 reply disagreed:

> [T]he Union seems to forget that Union stewards have attended new employee orientations since December 2018. Therefore, the Union has information about who attended the orientations and the dates of orientation. Further, the request asks RAS to provide "the number of authorization cards that were signed." However, authorization cards are Union authorization cards and are therefore well within the

Union's knowledge, possession, custody and control. Because the Union Stewards were present at new employee orientation and the authorization cards are Union authorization cards, the information requested is within the Union's knowledge, possession, custody and control.

January 8, 2021 Production of Documents

The parties stipulated that on January 8, 2021, the Respondent provided the Union with information responsive to the requests described in complaint paragraphs 7(a)(1) (Union Request No. 1) and 7(a)(iv) (Union Request No. 6). The parties further stipulated that the Respondent did not provide the Union with information responsive to the requests described in complaint paragraphs 7(a)(ii) (Union Request No. 4), 7(a)(iii) (Union Request No. 5), 7(a)(v) (Union Request No. 7), 7(a)(vi) (Union Request No. 8), and 7(a)(vii) (Union Request No. 9).

Analysis

When a union becomes the exclusive bargaining representative of a unit of employees, the Act imposes on it certain responsibilities and confers authority to carry out those responsibilities. The union represents these employees in negotiating a collective-bargaining agreement and also in enforcing its terms.

In general, an employer must furnish the exclusive bargaining representative, on request, information which is both relevant to the union's performance of such duties and necessary for that purpose. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). A liberal-type discovery standard applies when relevant or probably relevant information is sought by a union. *NLRB v. Acme Industrial Co.*, above. The initial inquiry, therefore, focuses on the relevance of the requested information. *West Penn Power Co.*, 339 NLRB 585, 589 (2003).[8]

1. Respondent's General Defenses

The Respondent's November 13, 2020 information request describes the information sought in various numbered paragraphs and some of the Respondent's defenses are specific to a particular paragraph or paragraphs. However, the Respondent also raises certain defenses to the information request in its entirety. It is appropriate to begin the analysis with these general defenses.

1. Union is not acting in the interest of bargaining unit employees and therefore not seeking information relevant to its statutory duties

In the present case, the Respondent contests the relevance of the requested information to the Union's performance of its duties as collective-bargaining representative. The relevance of

8 It may also be noted that an employer can violate the Act either by failing to provide requested relevant and necessary information or by unreasonably delaying in furnishing the information. *Finn Industries, Inc.*, 314 NLRB 556 (1994).

each portion of the information request will be discussed, item by item, below. However, the Respondent also disputes the relevance of the information request as a whole. Thus, its brief states:

> Critically, the Grievance does not revolve around an employee/bargaining unit issue, but rather an issue uniquely limited to *non-employee union staffers*. The Union has pursued this grievance in its own direct interest, not in the interests of the bargaining unit, with respect to its ability to recruit new employees at a company orientation meeting in a Right to Work environment. [Italics in original.] The only interest that new Company employees have upon hire is a free choice to decide whether to join the Union at all. The Company employees present at an orientation meeting are not yet - if ever - bargaining unit members. [Italics in original.]

It is appropriate to begin with the last two sentences quoted above, which state "The only interest that new Company employees have upon hire is a free choice to decide whether to join the Union at all. The Company employees present at an orientation meeting are not yet - if ever - bargaining unit members."

That passage could be read to suggest that an employee is not a "bargaining unit member" unless and until the employee joins the Union. Such a reading would be incorrect. Employees becomes bargaining unit members by filling positions within the bargaining unit, described above, and the Union has a duty to representative them regardless of union membership or nonmembership.[9]

In *FCA US LLC*, 371 NLRB No. 32 (October 28, 2021), the Board stressed that "information that does not directly concern terms and conditions of employment is not presumptively relevant even when sought for the purpose of processing grievances." 371 NLRB No. 32, slip op. at 3. However, the grievance concerns whether the collective-bargaining agreement allows union representatives to be with employees *while they are at work and on the clock.* Whichever way the arbitrator rules on this issue, her decision affects a condition of employment.

The Respondent appears to argue that the presence of union representatives benefits only the Union but not the employees. Stated another way, the Respondent contends that when the Union sought to have its employees attend new employee orientation meetings, it was not acting to further the interests of the employees it represents but only its own interests as an institution. That argument rests on the implicit, and dubious, assumption that affording new employees the

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9 Arguably, the Respondent might occasionally conduct new employee orientations solely for employees outside the bargaining unit. A literal reading of Article IV, Section 3 of the collective-bargaining agreement, allowing a union steward to attend "*each* employee orientation process to inform employees of their right to join the Union," (italics added) would permit the steward to attend orientation meetings attended only by non–unit employees and try to organize them. However, such an interpretation would be strained, and nothing in the record suggests the Union was seeking access to meetings solely of non–unit employees. I conclude it was not. Accordingly, in analyzing the argument raised in the portion of the Respondent's brief quoted above, I will assume that the Union's grievance only seeks access to meetings attended by employees working in, or soon to be working in, the bargaining unit.

opportunity to meet their union representatives does not make the Union more effective in voicing the employees' concerns at the bargaining table and in other dealings with management.

If anything, meeting union officials would tend to make employees more aware of their rights under the collective-bargaining agreement and more likely to contact the Union to complain of contract violations. Employees would be less reluctant to contact someone they have met, face-to-face, than to pick up a phone and dial a stranger.

The Respondent's argument - that it has no duty to furnish the information because the grievance concerns an issue "uniquely limited to non-employee union staffers" - also ignores the gravamen of the grievance which resulted in the information request. The grievance calls upon an arbitrator to interpret the terms of the collective-bargaining agreement to determine whether it confers a right for non–employee union representatives to attend new employee orientation meetings. If the contract does create such a right, that right inures to the benefit of the bargaining unit employees. It would be *their* right to have the union representatives present because it is among *their* contractual terms and conditions of employment.

The Act imposes on an employer the obligation to furnish the employees' exclusive bargaining representative with requested information which is relevant and necessary *to that union's performance of the duties imposed by the statute*. Most certainly, those duties include policing and seeking enforcement of the collective-bargaining agreement which it negotiated with the Respondent on the employees' behalf.

For these reasons, I reject the Respondent's argument.

2. The Union's Request Was Not in Good Faith

The Respondent also contends that the Union did not make the information request in good faith or as part of its bargaining duties. Analysis of this argument begins with the presumption that a union acts in good faith when it requests information from an employer, until the contrary is shown. *Mission Foods*, 345 NLRB 788 (2005), citing *Hawkins Construction Co.*, 285 NLRB 1313, 1314 (1987), enfd. denied on other grounds 857 F.2d 1224 (8th Cir. 1988).

With respect to the argument that the Union was acting in bad faith, the Respondent's brief states, in part:

> As explained above, the requests themselves had nothing to do with active bargaining unit members, were very late, and demanded a plainly unreasonable turnaround time. There is no defense for this sort of gamesmanship.
>
> It is especially telling that since filing its unfair labor practice charge on this point, the Union has made no attempt to compromise or seek some other resolution-other than to file yet additional charges. The Union was not, and is not, serious about needing the information for some bargaining-unit related reason. The

requests were a tactic, designed to result in a costly, burdensome unfair labor practice charge.

However, for the reasons discussed above, I have rejected the argument that the information requested "had nothing to do with active bargaining unit members." To the contrary, I have concluded that the Union was discharging its duties as exclusive bargaining representative when it filed the grievance and made the information request related to it. In view of this conclusion, I reject the Respondent's argument that the subject matter of the information request is evidence of bad faith.

The Respondent also contends that the information request was "very late, and demanded a plainly unreasonable turnaround time." When the Union made the information request on November 13, 2020, the arbitration was scheduled to take place on December 10, 2020. The Respondent thus argues that a time period of nearly 4 weeks was unreasonably short.

However, the Respondent notes that the Union's information request wanted the documents well before the December 10, 2020 arbitration date. Specifically, the Union's November 13, 2020 request asked for the documents by November 30, 2020.

It may not be quite correct to say that the Union set a deadline of November 30, 2020. It certainly didn't say "give us the information by November 30 *or else*," and neither side has unilateral authority to impose a hard-and-fast deadline. However, even if November 30 were considered a true deadline, it would give the Respondent 17 days to provide the information, which does not sound unreasonably short. Moreover, the Union did not deny any request for more time. In these circumstances, there is no basis to conclude that the Union acted in bad faith.

In its responses to the information request, the Respondent told the Union that "to the extent that RAS has any relevant and non-privileged information responsive to the Union's requests, it will provide that information within 52 days, exclusive of intervening holidays, such as Thanksgiving, Christmas Eve, Christmas, New Year's Eve, and New Year's Day."

Although the Respondent complained that the time period was too short, it did not propose to the Union that the arbitration be delayed until a later date. Even on January 8, 2021, when the Respondent furnished the Union with the documents described in complaint paragraphs 7(a)(i) and 7(a)(iv), it did not provide any other requested information.

Significantly, the Respondent's January 8, 2021 cover letter which accompanied the documents furnished on that date did not state that it needed more time to locate and provide the remaining documents and, likewise, it did not blame its failure to furnish those documents on a lack of time. Rather, it stated that "the remaining requests seek information and/or documents that are irrelevant, privileged and/or in the Union's knowledge, possession, custody and control."

In these circumstances, it is implausible to blame the Respondent's failure to produce requested documents on a lack of time. Moreover, the record does not establish that the Respondent asked the Union for an extension of time and the Union denied it, or even that the

Respondent asked for any extension at all. Likewise, the record does not establish that the Respondent requested that the arbitration be rescheduled.

The Respondent also argues that the Union's request was "a tactic, designed to result in a costly, burdensome unfair labor practice charge."

The record does not rule out the possibility that Union was retaliating, "tit for tat" in the Respondent's words, for the Respondent's earlier information request. The fact that the Union placed its information request at the bottom of its reply to the Respondent's information request is consistent with a bad faith motivation but far from enough to establish such a motive.

Additionally, the fact that the Union requested some information already in its possession, as discussed later in this decision, would be consistent with the Respondent's theory that the Union made its request in bad faith. However, "consistent with" tilts the scales of justice so slightly that a scientist's torsion balance would be needed to measure its evidentiary weight.

It is true, of course, that under certain circumstances, an information request can be used tactically not to obtain information but to cause delay. That might occur, for example, where a union and employer are apparently at impasse during collective bargaining and the union expects the employer to implement its contract proposal unilaterally. The Board has held that "where the Respondent had a legitimate doubt as to whether the Union was truly interested in the information for purposes other than forestalling the lawful implementation, the Respondent cannot be faulted for not furnishing the information more promptly." *ACF Industries, LLC*, 347 NLRB 1040, 1043 (2006). In that case, the Board concluded that the union's information request "was purely tactical and was submitted solely for purposes of delay." Id.

However, in the present case, the Union had no such reason to delay. Unlike in *ACF Industries, LLC*, there was no implementation to forestall. The record does not suggest any illegitimate motive except, possibly, retaliation, and the evidence does not elevate that possibility very much above the level of speculation.

The evidence falls short of proving that the Union submitted its information request solely in retaliation for the Respondent earlier information request. The Union had a legitimate reason—the grievance—for seeking the information.

The Respondent's brief argues that it is "especially telling that since filing its unfair labor practice charge on this point, the Union has made no attempt to compromise or seek some other resolution-other than to file yet additional charges." This argument ignores the normal order of proceeding. After the Union served the information request the ball was, metaphorically speaking, in the Respondent's court.

Assuming that the request seeks information that is relevant to and necessary for the union's performance of its duties as exclusive bargaining representative, an employer bears the burden of furnishing that information or else proposing a compromise that would satisfy the Union's needs.

That is true even when an employer asserts that requested information is confidential. *Oncor Electric Delivery, LLC*, 369 NLRB No. 69 (2020).

Here, the Respondent, after receiving the Union's information request, did not propose a compromise. The law does not require the Union to bargain against itself.

Even considered in its totality, the evidence offered by the Respondent to establish that the Union acted in bad faith falls short of overcoming the presumption that the Union made its information request in good faith. Therefore, I reject this proffered defense.

3. The General Counsel Has Not Proven Any of the Requested Information Exists or Within the Company's Possession, Custody or Control

The Respondent also would add to the General Counsel's burden of proof the requirement that the government must prove that the requested information exists and that the Respondent has or can obtain access to it. The Respondent's brief states, in part, as follows:

> The Complaint accuses the Company of failing to provide information responsive to the Union's requests, but does not and cannot actually prove that there is any such responsive, non-privileged information in existence, much less in the Company's possession, custody or control. . .
>
> This is a fatal deficiency in the General Counsel's case that cannot be remedied. It is impossible for the ALJ to craft an order compelling information that does not exist, or is unknown; and it may be impossible for the Company to comply with such an order, if no such information is available.

It is not clear what the Respondent meant when it stated that it "is impossible for the ALJ to craft an order compelling information that does not exist or is unknown. . ." Obviously, it would not be difficult to draft an order requiring the Respondent, for example to provide the Union with a unicorn, although complying with it would be another matter entirely. The complaint itself describes the information the Union requested and that description, or portions of it, easily could be used in an order, along with the qualification that the Respondent inform the Union if the sought information did not exist.

An employer's duty to furnish requested relevant information includes the duty to tell the union if the sought information does not exist. The fact that information does not exist is *itself* information pertinent to the union's request. In *Graymont PA, Inc.*, 364 NLRB 356 (2016), the Board stated:

> Under the duty to bargain, "[t]here can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-536 (1967) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956)). The

> obligation includes the duty "to timely disclose that requested information does not exist." *Endo Painting Service, Inc.*, 360 NLRB 485, 486 (2014).

Graymont PA, Inc., 364 NLRB at 361 (footnote omitted).

The Respondent appears to be arguing that the General Counsel had a duty, in drafting the complaint, to allege that the Respondent failed to furnish the Union with the described information or, if that information did not exist, *to inform the Union that it did not exist*. However, even if the complaint is flawed because it did not *separately* allege a failure to inform the Union that certain requested information did not exist, the flaw isn't fatal.

An allegation that the Respondent failed to inform the Union that requested information did not exist is closely related to the complaint allegation that the Respondent failed to produce this information. If such an allegation is fully litigated, a violation may be found based on a failure to notify the Union that the requested information did not exist, even in the absence of a specific complaint allegation to that effect. See *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990). enfg. 296 NLRB 333 (1989); *General Drivers, Warehousemen & Helpers Local Union No. 89 (Affiliated with the International Brotherhood of Teamsters)*, 365 NLRB No. 115 (December 15, 2017).

It also seems ironic that the Respondent would impose on the General Counsel the burden of proving that requested information exists when it *hasn't claimed* that there is no such information. Moreover, the stipulated record in this case does not establish that requested information does not exist. For all of these reasons I reject Respondent's argument.

4. Information is for Prearbitration Discovery

The Respondent argues that it has no duty to furnish the Union with the requested documents because the Union seeks them as prearbitration discovery. The Respondent's brief states:

> Standards of discovery procedures under the Federal Rules of Civil Procedure are applicable to union requests for information. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). However, pre-arbitration discovery requests - like those at issue here - are not permitted, and an employer's failure to fulfill these requests will not give rise to a statutory violation. *Oncor Electric Co. LLC*, 364 NLRB 788 (2001)[10]; *California Nurses Assn.*, 326 NLRB 1362 (1998); *Tool & Die Maker's Lodge 78 (Square D Co.)*, 224 NLRB 111, 112 (1976).

In the cited *California Nurses Assn.*, 326 NLRB 1362 (1998), the Board stated that "it is well settled that there is no general right to pretrial discovery in arbitration proceedings. *Tool &*

10 *Oncor Electric Co. LLC*, 364 NLRB 788 (2001) cannot be found, and it appears that the Respondent intended to refer to *Oncor Electric Delivery Company, LLC*, 364 NLRB 677 (2016).

Die Maker's Lodge 78 (Square D Co.), 224 NLRB 111, 112 (1976); *Cook Paint & Varnish Co.*, 246 NLRB 646 (1979), enf. denied on other grounds 648 F.2d 712 (D.C. Cir. 1981)."

In *Hamilton Park Health Care Center*, 365 NLRB No. 117 (2017), the Board adopted the judge's application of this principle to particular facts. The judge reasoned:

> Recently, in *Oncor Electric Co., LLC*, 364 NLRB 677, 713 (2016), the Board had the opportunity to address the scope of *California Nurses Association's* prohibition on prearbitration discovery In *Oncor Electric* the employer denied the union's third-step grievance over the discharge of an employee. On February 26, 2013, the union filed a request for arbitration and on March 25, 2013, made an information request in connection with the upcoming arbitration on the discharge. Id. The company asserted that it had no obligation to comply with the information request, claiming that it was an attempt by the union for pre-arbitration discovery. Id. slip op., at 21. The Board affirmed the trial judge who found that "at the prearbitration stage, a party can request substantive information pertaining to the issues but not information about the parties' presentation of its case before the arbitrator." Id. slip op., at 1, 21. Thus, in relationship to the ban on prearbitration discovery, the Board focuses on the nature of then requested, *making a distinction between information that delves into litigation strategy and preparation which is deemed improper prearbitration discovery, as opposed to substantive information pertaining to the issues at arbitration, which must be produced*. Id. at 21.

Hamilton Park Health Care Center, 365 NLRB No. 117, slip op. at 7–8 (italics added).

The Board thus draws a distinction between "substantive information pertaining to the issues at arbitration," which must be furnished on request, and "information that delves into litigation strategy and preparation," which need not be furnished. In some instances, the nature of the information sought will determine how it is classified. For example, an employer is not required to reveal the names of witnesses it intends to call because the choice of witnesses is a matter of litigation strategy.

The timing of the information request also may shed light on whether the requesting party seeks the information to determine if there has been a breach of the collective-bargaining agreement or other basis for filing a grievance, or whether that party is seeking to engage in general pre-arbitration discovery. For example, in *Ormet Aluminum Mill Products Corporation*, 335 NLRB 788 (2001) the Board stated:

> The simple fact is that the Union made the information requests at the third step of the grievance procedure and, obviously, before the grievances had been denied and referred to arbitration. Thus, since the grievances were not pending arbitration when the Union made its information requests, it cannot be said that the Union is, in effect, seeking pretrial discovery through them. . .

335 NLRB at 789.

In the present case, the arbitration date already had been set before the Union made its information request. That fact weighs in favor of finding that the request was an attempt to obtain pre-arbitration discovery, but it is not dispositive. The analysis must also consider whether the requested information is "substantive information pertaining to the issues at arbitration," which must be furnished on request, and "information that delves into litigation strategy and preparation," which need not be furnished. *Hamilton Park Health Care Center*, above.

In the present case, some of the requested information falls into the first category, but other requested information falls into the second. Therefore, whether a particular portion of the requested information constitutes impermissible pre-arbitration discovery will be considered below, with respect to each allegation.

The Individual Allegations

Complaint Paragraph 7(a)(i)

The first paragraph of the Union's November 13, 2020 information request (Union Request No. 1) sought the following: "Any and all Company handbooks and policies, including but not limited to security and plant visitation policies." (Union Request No. 1) The complaint alleges that from about November 14, 2020, until January 8, 2021, the Respondent unreasonably delayed in furnishing the Union with this information and thereby violated Section 8(a)(5) and (1) of the Act.

Based on the parties' stipulation, I find that the Union did request this information on November 13, 2020, and that the Respondent furnished it to the Union on January 8, 2021. In analyzing whether the Respondent's delay in providing the information violated the Act, I first must determine whether the information is relevant to the Union's duties as exclusive bargaining representative and whether it is necessary. If the information is relevant and necessary, I must then determine whether the delay was unreasonable.

Generally, information pertaining to employees within the bargaining unit is presumptively relevant. *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006); *CalMat Co.*, 331 NLRB 1084, 1095 (2000). Arguably, the phrase "company handbook" might include manuals and policies applicable only to employees outside the bargaining unit, but the term typically would be understood to be synonymous with "employee handbook," signifying a document which described terms and conditions of employment generally applicable to all employees, including members of the bargaining unit.

The Board construes requests that seek presumptively relevant information as pertaining to unit employees, even though the information requested is not consistently described in these specific terms. See, *Mission Foods*, 345 NLRB 788 (2005), citing *Metro Health Foundation, Inc.*, 338 NLRB 802 fn. 2 (2003). In the present case, the Respondent has not objected that this request seeks material not applicable to bargaining unit employees. Therefore, I conclude that Union Request No. 1 seeks information that pertains to unit employees and therefore is presumptively relevant.

Even apart from the presumption, the manuals and policy statements are clearly relevant. The Union sought them in connection with its grievance concerning the right of union representatives to attend orientation meetings for new employees. Thus, the request directly related to the Union's functions as exclusive bargaining representative.

Having concluded that the requested information is relevant to the performance of the Union's duties as exclusive bargaining representative, I turn to whether it is necessary for that purpose. Necessity for the information is not a guideline in itself but is directly related to relevance. *Bacardi Corporation*, 296 NLRB 1220 (1989), citing *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965). Therefore, I conclude that the presumption of relevance also provides guidance in resolving issue of necessity. As already noted, Respondent has not rebutted this presumption.

Moreover, the Respondent's own descriptions of its established policies may reveal whether it routinely allowed visitors *other than* union representatives to attend new employee orientation meetings. This information obviously might be useful to the Union in formulating its arguments in support of the grievance. In *United States Postal Service*, 337 NLRB 820 (2002), the Board stated:

> The legal standard concerning just what information must be produced is whether or not there is "a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Bohemia, Inc.*, 272 NLRB 1128 (1984). The Board's standard, in determining which requests for information must be honored, is a liberal discovery-type standard. *Brazos Electric Power Cooperative*, 241 NLRB 1016 (1979). The Board, in determining that information is producible, does not pass on the merits of the grievance underlying a request. . .

337 NLRB at 822, quoting *Asarco, Inc.*, 316 NLRB 636, 643 (1995), enfd. in relevant part 86 F.3d 1401 (5th Cir. 1996). Applying this standard, I conclude that the requested information is both relevant to the Union's duties as exclusive bargaining representative and necessary to perform them.

Next, I consider whether the Respondent delayed unreasonably in furnishing this information, in violation of Section 8(a)(5) of the Act. In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. *West Penn Power Co.*, 339 NLRB at 587. As the Board stated in *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993), "it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good-faith effort to respond to the request as promptly as circumstances allow."

The totality of circumstances include, "the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *West Penn Power Co.*, 339 NLRB

at 587, quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). As the Respondent noted in its brief, considerations "also include whether the matters are time sensitive, and whether the delay 'severely diminished' the usefulness of the information to the union. *Woodland Clinic*, 331 NLRB 735, 737 (2000)."

The first three of these factors—complexity, extent of information sought and difficulty of retrieval—all relate to how much time reasonably would be necessary to assemble or compile the requested information. That time could be considerable if, for example, the request called for copious statistical information kept in a database. However, it reasonably would not take much time for the Respondent to provide the Union with the handbooks and policy statements sought.

Because an employer uses a handbook to communicate its policies to employees, it typically keeps on hand many copies or else stores the contents of its handbook in a readily accessible place so that a copy can be printed out (if the information is in electronic form) or photocopied whenever needed.

Likewise, an employer typically keeps other statements of its policies in an accessible place so they may be reproduced and distributed as necessary. The Respondent has not argued that it has deviated from this general practice, so I conclude that it would not be difficult or burdensome for it to provide copies to the Union.

The Respondent argues that two other factors—whether the matters are time-sensitive and whether the delay severely diminished the usefulness of the information to the Union—weigh in its favor. The Respondent cites *Woodland Clinic*, above, to illustrate that the time-sensitive nature of the requested information should be considered in determining whether a delay in providing it is reasonable.

In that case, it is true that the Board, in finding a 7-week delay violative, took into account the union's immediate need for the information in connection with collective bargaining. The Board likewise noted that the employer provided the information only 1 day before it declared impasse. The Board also considered the employer's failure to justify the delay:

> Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation of Section 8(a)(5) inasmuch "[a]s the Union was entitled to the information at the time it made its initial request, [and] it was Respondent's duty to furnish it as promptly as possible." *Pennco Inc.*, 212 NLRB 677, 678 (1974). The Respondent has presented no evidence justifying its delay in furnishing the requested information.

Woodland Clinic, 335 NLRB at 737.

On November 30, 2020, the arbitrator postponed the arbitration, which had been scheduled for December 10, 2020 - because of the Covid pandemic. It appears that the arbitration still has not taken place. Therefore, I cannot conclude that the requested handbooks and policy statements

are particularly time-sensitive, or that the delay in providing them severely diminished the usefulness of that information to the Union. But although these two particular factors weigh in the Respondent's favor, some other factors do not,

In determining whether the delay was reasonable, I apply an objective standard, focusing on whether the Respondent supplied the requested information in a reasonable time. *FCA USA LLC*, above, 371 NLRB No. 32 slip op. at 2.

In the present case, the Respondent' asserted justifications for the delay include the Covid pandemic and the Thanksgiving, Christmas and New Years holidays. Considering how little time would be involved to locate the employee handbook and any policy statements, these reasons do not constitute an adequate justification for the 56-day delay from November 13, 2020, when Union made its request, to January 8, 2021, when it received the documents.

In its November 25, 2020 and December 16, 2020 letters to the Union, quoted above, the Respondent pointed to the length of time the Union took to furnish requested information as proof that its own delay was reasonable. If the Union took 52 days to furnish requested information, the Respondent implied, it would be reasonable for the Respondent to take just as long. As the Respondent's December 16, 2020 letter to the Union stated, it was "simply utilizing the timeframe the Union previously agreed to, and in fact requested, for its good faith responses to the Union's requests."

In that letter, the Respondent also denied that it was retaliating "tit-for-tit" for the Union's delay. However, applying an objective standard, I need not consider whether the Respondent acted in good faith. *FCA USA LLC*, above.

Moreover, pointing to how long it took a different entity to respond to a different information request neither explains nor justifies why the Respondent took 56 days to furnish the Union with its handbook and policy statements. In *Woodland Clinic*, above, after the union requested employees' home telephone numbers, the employer took 7 weeks to furnish the information. The Board, finding that the employer's delay violated Section 8(a)(5) of the Act, stated:

> The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Good Life Beverage Company*, 312 NLRB 1060, 1062 fn. 9 (1993).

Woodland Clinic, 331 NLRB at 737.

Here, I conclude that the Respondent did not furnish the requested information as promptly as circumstances allowed and that this delay was objectively unreasonable. Whether this delay violated the Act depends on whether the information sought falls within the category of "prearbitration discovery."

As noted above, the Union made the information request after the case had been scheduled for arbitration. In this circumstance, if the requested information delves into litigation strategy and preparation, the Board considers the request to attempt prearbitration discovery and neither a refusal to furnish the information nor an unreasonable delay in furnishing it violates the Act. However, if the request seeks substantive information pertaining to the issues at arbitration, the "pre-arbitration discovery defense" is unavailing. *Hamilton Park Health Care Center*, 365 NLRB No. 117, slip op. at 8 (italics added).

A request for company handbooks and policies does not delve into litigation strategy or preparation, but instead seeks substantive information pertaining to the issues to be arbitrated.[11] Therefore, I conclude that the request seeks substantive information pertaining to the issues at arbitration, which must be produced. *Hamilton Park Health Care Center*, above.

For reasons discussed above, I have concluded that the Respondent delayed unreasonably in providing the Union with the requested information described in complaint paragraph 7(a)(i). Rejecting the Respondent's defenses, I further conclude that its delay was unreasonable, and violated Section 8(a)(5) and (1) of the Act.

Complaint Paragraphs 7(a)(ii) and 7(a)(iii)

The fourth item on the Union's November 13, 2020 information request (referred to here as Union Request No. 4) seeks "[a]ny and all documents, information, and/or communications relating to Respondent's interpretation of Article 4 Section 3 of the Collective-Bargaining Agreement." The fifth item (Union Request No. 5) seeks similar information pertaining to Article 27 of the collective-bargaining agreement.

1. Respondent's Argument That Union is Seeking Pre-Arbitration Discovery

The information sought in Union Requests 4 and 5 relate directly to its grievance and the presentation of its case to the arbitrator. As discussed above, in the grievance proceeding, the Respondent cites Article 4, Section 3 of the contract to support its position that non-employee Union representatives have no right to attend new employee orientation meetings. The Union takes the opposite position based on Article 27.

The fact that the Union was seeking documents related to the Respondent's *interpretation* of the collective-bargaining agreement indicates an intent to obtain information about the arguments the Respondent would make before the arbitrator. It thus delves into Respondent's litigation preparation and strategy.

More specifically, an information request seeking "any and all" materials relating to the Respondent's *interpretation* of the contract would force the Respondent to reveal what it

11 Moreover, the Respondent's privilege arguments clearly do not and could not apply to manuals and policy statements distributed to employees.

considered relevant. From the Respondent's choices, the Union could, at least partially, discern the Respondent's arbitration strategy.

Additionally, the information requests are rather vague and open-ended. They seek to mine with a wide scoop. That too, is consistent with the conclusion that the Union is seeking information about how the Respondent's preparations and strategy. See *International Union of Operating Engineers, Local 501 (GNLV Corp. d/b/a Golden Nugget Las Vegas)*, 366 NLRB No. 62 at fn. 1 (April 20, 2018).

All of these factors—the timing of the information request, the fact that it sought the Respondent's interpretations of the collective-bargaining agreement, the open-ended description of the information sought, and the fact that providing the requested information would reveal some of the Respondent's litigation strategy—lead me to conclude that Union Request Nos. 4 and 5 attempt general pre-arbitration discovery. Therefore, I conclude that the Respondent had no obligation to furnish the Union with the information sought by Union Request Nos. 4 and 5 and did not violate the Act by refusing to do so.

2. Respondent's Privilege Argument

In view of my conclusion that the Respondent had no duty to provide the information described in complaint paragraphs 7(a)(ii) and 7(a)(iii) because the Union sought this information for pre-arbitration discovery, it is not necessary to consider the Respondent's further argument that the information is "protected by the attorney-client privilege, *self-critical analysis privilege, internal investigative privilege*, and work-product doctrine." However, should the Board disagree with this conclusion, I am including the following analysis of the privilege issues.

The Respondent asserted these privileges in its November 25, 2020 reply to the Union's information request. The Union, in its December 9, 2020 reply, informed the Respondent that it was not seeking "information protected by the attorney-client privilege or work product doctrine." It disputed the existence of the other two claimed privileges. The Union's reply further stated:

> Please provide all responsive non-privileged information requested as well as legal authority for all asserted privileges, and explain how bargaining notes or communications made to non-attorney Company representatives are not subject to disclosure.

The Respondent did not furnish the Union with "responsive non-privileged information requested. . ." Instead, its December 16, letter to the Union stated:

> While your letter asserts that the request does not seek information protected by attorney-client privilege or work product doctrine, the language of the request indicates otherwise. Specifically, the request states: "Any and all Company bargaining notes or communication [sic][12] made during the 2018 negotiations."

12 "[Sic]" in original.

> Inherently, this includes any notes or communications made between RAS and its counsel as well as notes or communications RAS's counsel directed it to make in preparation of litigation.

The Respondent's reply does not deny the existence of non-privileged documents. In fact, stating that the Union's request *includes* some privileged documents implies that other documents, not protected by the attorney-client privilege or work product doctrine also fall within the scope of the request.

However, the Respondent did not furnish other requested documents which it did not deem protected by the attorney-client privilege or work product doctrine. Presumably, it considered those documents shielded from disclosure by the other two privileges it claimed, the "self-critical analysis privilege" and the "internal investigative privilege."

The Union's December 9, 2020 letter had asked the Respondent to cite legal authority for the existence of those two claimed privileges. The Respondent's reply did.

With respect to the "self-critical analysis privilege," the Respondent's December 16, 2020 letter to the Union cited *Asarco, Inc. v. NLRB*, 805 F.2d 194, 200 (6th Cir. 1980). To support its assertion of an "internal investigative privilege," the Respondent cited *Union of Elec., Radio & Mach. Workers*, 648 F.2d 18, 28 (D.C. Cir. 1980).

In *Asarco*, a fatal accident occurred at the employer's facility. An inspector from the Mine Safety and Health Administration investigated the circumstances and wrote a report. The union received a copy. The employer also conducted its own internal investigation and the union requested a copy of the resulting report.

The employer refused to furnish the union a copy. The Board found that this refusal, as well as the employer's refusal to furnish the union with certain other information and to allow a union safety expert access to the property, violated Section 8(a)(5).

The Court enforced the Board's order to allow the union's safety expert access and furnish information other than the employer's own internal report. The Court concluded that this information and access, together with information the union already possessed, sufficed to allow the union to make its own analysis of the accident.

The Court further concluded that disclosure to the union of the employer's internal report would chill the practice of uninhibited self-critical analysis. Therefore, it found that the employer did not have to furnish its report to the union.

The present case bears little resemblance to *Asarco*. There has been no fatal accident, or even a nonfatal accident. Nothing suggests that the Respondent seeks to protect any specific report of any specific matter. The Respondent hasn't claimed to have engaged in any specific "uninhibited self-critical analysis."

That phrase, untethered to any fact, has no more weight than a stringless kite in a gust of wind. The Respondent's argument is even less substantial than a similar argument advanced by the respondent in *Detroit Newspaper Agency and The Detroit Free Press, Inc.*, 317 NLRB 1071 (1995).

In that case, at least, the respondent was applying the "uninhibited self-critical privilege" argument to a specific, identified document, an audit report. However, the Board found this audit to be quite different from the investigative report in *ASARCO*:

> [T]his case involves an annual health and safety audit routinely made by the parent corporation in all Knight-Ridder facilities, rather than a report in response to a specific health and safety problem, let alone an accident causing an employee's death. Although the audit's recommendations were undoubtedly made to improve safety, there is no evidence that the audit contained speculative materials or criticisms of persons, events, and equipment. And there is no testimony, as in *ASARCO*, that the substance, as opposed to the tone, of the audit would be changed or that it was prepared in anticipation of litigation. In addition, the record here fails to support a finding that the Union had available to it all the factual information in the audit. The Union was not invited to, and did not, participate in the audit or accompany King and Straughn when they made the audit, and the Respondent has not offered or made available to the Union the records that King and Straughn reviewed. These differences from *ASARCO* are significant and call for a result different from *ASARCO*.

Detroit Newspaper Agency and The Detroit Free Press, Inc., 317 NLRB at 1074.

Considering that the present facts diverge from those in *ASARCO* even more than the facts in *Detroit Newspaper Agency and The Detroit Free Press, Inc.*, I conclude that *ASARCO* is distinguishable. Further, I conclude that the claimed "self-critical analysis privilege" does not apply.

The Respondent further claims that an "internal investigative privilege" applies and protects the sought documents from disclosure. It cites *International Union of Electrical Radio and Machine Workers v. NLRB*, 648 F.2d 18 (D. C. Cir. 1980), in which the United States Court of Appeals for the District of Columbia Circuit affirmed a Board holding that the Act did not require employers to provide their affirmative action plans to requesting unions.

The Court based this conclusion on two principles. First, the affirmative action plans memorialized the employers' future goals in hiring, but that it was not normally a union's duty to challenge an employer's future plans, goals or commitments. Second, an employer's need for confidential, frank self-analysis outweighs the union's interest in seeing the affirmative action plan.

The court's reasoning is not unlike the Board's reasoning in concluding that a requesting union is not entitled to discover, through an information request, documents revealing an

employer's litigation strategy or preparation. Certainly, an employer's litigation strategy reflects future plans and goals.[13]

However, since the documents sought by the Union here do not relate to an investigation, it would be a confusing misnomer to hold that a newly-found "internal investigative privilege" existed which protected the Respondent's arbitration preparation documents from disclosure to the Union. Rather, I base that conclusion on the well-established principle that the information request process generally cannot be used for pre-arbitration discovery.

In sum, I reject the arguments based on the claimed "self-critical analysis privilege" and "internal investigative privilege." The attorney work product doctrine might well be applicable to some of the documents described in the information request, but the Union informed the Respondent that it was not seeking such documents. Accordingly, my conclusion that the Respondent need not furnish the information described in complaint paragraphs 7(a)(ii) and 7(a)(ii) is based solely on the Board's precedents concerning pre-arbitration discovery.

Complaint Paragraph 7(a)(iv)

Complaint Paragraph 7(a)(iv) alleges that, on about November 13, 2020, the Union requested that the Respondent provide "Any and all Respondent representatives who were involved in the 2018 contract negotiations." This language quotes Union Request No. 6 in its November 13, 2020 letter to the Respondent.

Read literally, the request would require the Respondent to furnish the Union with its negotiators themselves. However, an information request is not a writ of habeas corpus. From context, it appears clear that both the Union and the Respondent understood the request simply to seek the *names* of the Respondent's bargaining representatives.

The Respondent furnished the Union with this information on January 8, 2021. The complaint does not allege that the Respondent failed to provide this information but only that it unreasonably delayed in furnishing it from November 14, 2020, to January 8, 2021.

Respondent, however, asserts that the delay was not unreasonable. It contends, in effect, that the amount of time the Union took to furnish information that the Respondent had requested,[14] which Respondent calculates to be 52 days, sets the standard for reasonableness. However, the

13 The Respondent's use of the term "internal investigative privilege" suggests in may be citing *International Union of Electrical Radio and Machine Workers v. NLRB* for another reason. The Court also held that the employers did not have to furnish the union with copies of employees' complaints about workplace discrimination. The Court reasoned that employees would be less likely to complain if they knew that union officials would see their complaints. However, the Union's requests under consideration in the present case did not ask the Respondent to furnish information about employee complaints. Therefore, that part of the Court's reasoning is not applicable.

14 The Respondent maintains that the Union never furnished much of the information it had requested. However, the sufficiency of the Union's response to the Respondent's information request is not an issue in this proceeding.

reasonableness of a delay must be judged by objective standards applied to the totality of facts and circumstances of each case.

The only appropriate standards come the Board decisions which apply the general principles to specific facts. The Respondent has not claimed that the Board considered the Union's 52-day delay and held that it was justified under the circumstances,[15] Therefore, the Union's delay in furnishing information requested by the Respondent has limited relevance.

The present analysis will follow Board precedents articulating the factors to be considered. Those include "the complexity and extent of information sought, its availability and the difficulty in retrieving the information" *West Penn Power Co.*, above, whether the matters are time sensitive, and whether the delay "severely diminished" the usefulness of the information to the union. *Woodland Clinic*, above.

With respect to complexity and availability of the information, the Union sought the names of the Respondent's 2018 bargaining representatives. That information is not complex and nothing in the record suggests that it would be hard to locate.

The information isn't time sensitive. On November 30, 2020, the arbitrator postponed the arbitration because of the pandemic and, although the arbitrator proposed a new date, the record does not establish that the hearing has been rescheduled. The delay, therefore, did not severely diminish the usefulness of the information.

The Respondent also contends that the Union has possessed this information all along. In its brief the Respondent stated:

> Suffice it to say, if the requesting party has the ability to obtain the information internally, it should obtain the information in that manner, and not by burdening the responding party. Indeed, the Union made this very same objection as to one of the Company's requests. See Stip., Ex. 13, 11/13/20 Suetholz letter, p. 4 (Response to Follow-up No. 13). And, the Union has never denied it has this information available.

As noted above, the parties refer to this request for the identities of Respondent's negotiators as "Request No. 6." In its November 25, 2020 reply to the Union's information request, the Respondent specifically stated that this information was "within the possession, custody, control and knowledge of the Union."

If this assertion were untrue, if the Union did not already possess the names of the Respondent's negotiators, the Union reasonably would deny it. However, the Union did not deny this claim in the Respondent's November 25, 2020 letter.

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15 When the General Counsel, after investigation of a charge, decides not to issue complaint, that exercise of prosecutorial discretion is not a decision on the merits by the Board, and sets no precedent.

More specifically, the Union's December 9, 2020 reply to that November 25, 2020 letter addresses the points Respondent raised about other parts of the Union's information request, but says nothing at all about Request No. 6. Neither in this December 9, 2020 letter nor in other correspondence did the Union deny that it possessed the names of the Respondent's negotiators.

This absence of a denial should be compared to another instance when the Respondent informed the Union that the Union already had possessed some other information it had requested. This requested information is described in complaint paragraph 7(a)(vii) and is discussed under that heading below. The Respondent's November 25, 2020 reply to the information request stated that the Union already had this information, concerning the new employee orientation meetings, because a union steward was present at each such meeting. The Union's December 9, 2020 reply informed the Respondent that "the Union has no notes or records in its possession reflecting the information requested."

However, when the Respondent told the Union that it already had the names of the Respondent's negotiators the Union did not deny it. Moreover, it would be quite unusual for a union to negotiate an entire collective-bargaining agreement and not know the names of the people who sat on the other side of the bargaining table.

The Union's December 9, 2020 letter to the Respondent specifically explained why the presence of its stewards at the new employee orientations did not result in it possessing the information it had requested about those meetings. It informed the Respondent that it had no notes or records reflecting that information. That is quite plausible because there is no apparent reason why stewards would need to take notes at these meetings. They were there to tell the new employees about the Union and to offer them the opportunity to join.

However, in collective bargaining, negotiators customarily take notes. If they had not done so, or if the Union had misplaced the notes, presumably it would have explained to the Respondent why it did not have any documents identifying the Respondent's negotiators. But the record does not indicate that the Union ever stated to the Respondent that its 2018 negotiators hadn't made notes, or that they were no longer employed by the Union, or that they had forgotten the names of the Respondent's representatives, or that the bargaining notes had been lost or destroyed.

Therefore, I find that the Union already possessed this information at the time it made the request for it.

Does the Respondent have an obligation to furnish the Union with information it already possesses? In *Detroit Newspaper Agency and The Detroit Free Press, Inc.*, above, the Board stated that "even assuming that the Respondent has previously provided the Union with *similar information*, we find that the Respondent has failed to show that the other information satisfies its obligation to furnish the requested audit." (Italics added.)

Of course, "similar" does not mean "identical." The facts in *Detroit Newspaper Agency* clearly show that the union in that case was seeking *more* than just a repetition of the information it had already received.

The union had requested a copy of a safety audit conducted by the employer after a fatal accident. Certainly, the employer already had furnished the union with some of the information which would appear in that audit but that piecemeal information would not be an adequate substitute for data obtained in an audit, a thorough, systematic effort to identify potential safety problems.

By contrast, here the Union requested exactly the same information it already had acquired when it negotiated the contract. Because the Union already possessed the information described in Union Request No. 6, I further conclude that the Respondent had no duty to provide the information described.[16] Nonetheless, the situation is different because the Union knew the names of the Respondent's negotiators at the time it requested that information. It would be very difficult to conclude that a delay in furnishing information the Union *already possessed*—and which the Respondent *knew* that the Union already possessed—caused the union delay or otherwise impeded its preparations for the arbitration. Therefore, I further conclude that the Respondent did not violate the Act by any delay in furnishing it.

Complaint Paragraph 7(a)(v)

Complaint paragraph 7(a)(v) describes the information sought by Union Request 7 (numbered paragraph 7 of the Union's November 13, 2020 information request. More specifically, that request sought:

> Any and all transcripts, recordings, notes, or other documents memorializing any testimony, statements, or interviews given by any Respondent manager or supervisor relating to this grievance, including without limitation all witness statements or admissions by any party whether recorded, transcribed, paraphrased, handwritten or otherwise.

As discussed at greater length above, the Respondent must provide requested relevant and necessary substantive information pertaining to the issues at arbitration, but has no duty to furnish

16 Finding no duty to furnish the information, I need not reach the issue of whether the requested information was relevant and necessary. However, should the Board decide that I erred in deciding that no duty existed, I would conclude that the requested information was relevant and necessary.

Additionally, in view of my finding that no duty existed to furnish the information, there also is no need to resolve the issue of whether the Respondent's delay in providing it was unreasonable. Were I to reach that issue, I would conclude that the delay was not unreasonable. Such a conclusion would require some explanation because it would be inconsistent with the conclusion I reached concerning the Respondent's delay in furnishing the information described in complaint paragraph 7(a)(1).

More specifically, for reasons discussed above, I have found that the Respondent did delay unreasonably in furnishing the requested handbooks and policies described in that earlier complaint paragraph. The information here, the names of the Respondent's representatives during the 2018 negotiations would appear equally easy to locate and furnish. The factors found insufficient to justify the delay in furnishing those handbooks and policies —the pandemic and the holidays—are the same factors advanced to justify the Respondent's delay in furnishing the names of its negotiators. to furnishing the names of Respondent's representatives.

the Union with information which delves into litigation strategy and preparation. See *Hamilton Park Health Care Center*, above. The information described in complaint paragraph 7(a)(5) falls into the latter category.

In reaching this conclusion, I note first that the Union filed the information request after the case was scheduled for arbitration. Moreover, the record does not establish that the Union requested the information for any reason other than its own preparations for arbitration.

The requested information includes both witness statements and other records which similarly memorialize the testimony which a particular witness would be expected to give during the arbitration. The request also seeks evidence of "admissions by any party."

The request thus seeks information which would reveal the Respondent's preparations for the arbitration, including the names of potential witnesses and what testimony they would give. This requested information also would provide clues to the Respondent's likely litigation strategy. Considering these factors, as well as the timing of the request—after a date for arbitration had been set—and the request for "admissions," I conclude that the request constitutes pre-arbitration discovery delving into the Respondent's preparations and strategy.

Therefore, I conclude that the Respondent had no duty to furnish the requested information. Further, I conclude that failing to furnish this information did not violate the Act.[17]

However, I do not engage in such a balancing test here because the Respondent argues that the statements are protected from disclosure because they constitute pre–arbitration discovery. Based on the current record, it does not appear that the balancing test contemplated by *American Baptist Homes of the West d/b/a Piedmont Gardens* would be appropriate or even possible.

Complaint Paragraph 7(a)(vi)

Complaint paragraph 7(a)(vi) describes the information sought in paragraph 8 of its November 13, 2020 information request which, for brevity, will be called Union Request No. 8. Specifically, the Union requested:

17 At one time, an employer did not have a duty to furnish witness statements to a requesting union. See *Anheuser-Busch, Inc.*, 237 NLRB 982, 984–985 (1978) However, in *American Baptist Homes of the West d/b/a Piedmont Gardens*, 362 NLRB 1135 (2015), the Board overruled *Anheuser-Busch*. It held that in future cases in which an employer asserted a confidentiality interest in protecting witness statements from disclosure, the Board would apply the balancing test set forth in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979).

An employer might argue, for example, that disclosure of witness statements would make employees less likely to speak frankly and, similarly, might discourage employees from cooperating in future investigations. An employer might also assert that it had assured the witness that the statement would be confidential. The Board would weigh these interests against the union's need for the statement.

> All statements, notes, or written communication made on July 23, 2020, July 30, 2020, July 31, 2020, August 5, 2020, and/or August 6, 2020 pertaining to the Union's respective visits to, or meeting(s) held at, the facility.[18]

The Respondent argues that it has no duty to furnish the Union with this information because the request is seeking pre-arbitration discovery.

The language under consideration here differs somewhat from the language of Union Request No. 7, discussed above. Union Request No. 7 sought witness statements, among other things, but did not limit the request to statements made during a particular time period. In contrast, Union Request No. 8 requests statements made on certain specified dates. These dates, with the exception of August 6, 2020, were before the Union filed the grievance giving rise to the information request. Union Request No. 8 also seeks statements made on August 6, 2020, the same day it filed the grievance, but no statements made after that date.

Whether the Respondent's "pre-arbitration discovery" argument prevails depends on whether the information sought delves into the Respondent's preparations and strategy for the arbitration. However, it isn't obvious how statements, notes and communications made on or before the day the grievance was filed could reveal anything about the Respondent's later preparations and formulations of strategy for the arbitration.

The Respondent's brief does not address this specific question and nothing in the record suggests a way that documents created before or at the time the grievance was filed could provide a window into the strategy the Respondent would later adopt or the preparations the Respondent later would make for the arbitration hearing. Accordingly, I conclude that the information request did not delve into Respondent's preparations and strategy for the arbitration.

Instead, I find that the information request sought substantive information pertaining to the issues at arbitration, which must be produced. *Hamilton Park Health Care Center*, above. Therefore, I reject the Respondent's argument that Union Request No. 8 impermissibly seeks pre-arbitration discovery.

Apart from its pre-arbitration discovery argument, the Respondent has not advanced another basis for protecting the statements from disclosure. For example, it has not asserted that the witnesses agreed to provide the statements after receiving assurances of confidentiality. Likewise, the Respondent has not offered any other argument for confidentiality which would need to be weighed against the Union's need for the statements. Therefore, it is not necessary to apply the balancing test contemplated by *American Baptist Homes of the West d/b/a Piedmont Gardens*, above.

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18 As noted above in footnote 5, there is a slight difference between the actual language of the information itself, which seeks "written communication" and the language of complaint paragraph 7(a)(vi), which reads "witness communication."

Finding that the requested information described in complaint paragraph 7(a)(vi) is relevant and necessary for the Union to perform its statutory duties as exclusive bargaining representative, I conclude that the Respondent had a duty to furnish it. Further, I conclude that by failing to provide the Union with this information, the Respondent violated Section 8(a)(5) and (1) of the Act.

Complaint Paragraph 7(a)(vii)

Complaint Paragraph 7(a)(vii) describes the information sought in Union Request No. 9, the ninth numbered paragraph of the Union's November 13, 2020 information request. It seeks:

> For the past 3 years, please provide:
>
> - A list of names of all employees who have attended each new employee orientation
> - The date of each orientation
> - Identify which steward(s) and/or Union agents(s) attended and/or presented
> - Identify the Respondent representative present
> - The Number of authorization cards that were signed.
> - Any sign-in sheets or any other record(s) of attendance that may have been kept
> - Any and all Respondent notes or communication from each orientation still in Respondent's possession.[19]

The Respondent's November 25, 2020 reply to the information request objected that the information sought was not relevant to the grievance. Respondent also objected that the request was "overly broad, unduly burdensome and not reasonably limited in time and scope. There have been over a hundred new employee orientations over the last three years." The Union's December 9, 2020 reply addressed these objections:

> With respect to the time and scope covered by this request, the Union is entitled to information that would show, or not show, whether the Company's actions at issue are consistent with its previous practice. In order to determine whether such a

19 The complaint alleges that, with one small exception, all of this requested information is relevant and necessary. The exception arises because complaint paragraph 7(b), which generally alleges the relevance and necessity of the information described in complaint paragraph 7(a), excludes "any and all Company notes or communication from each orientation still in Respondent's possession (paragraph 7(a)(vii) bullet point 7) that do not pertain to the Union." Accordingly, I will consider bullet point 7, above, to read: Any and all Respondent['s] notes or communication from each orientation *that pertain to the Union* and are still in Respondent's possession."

> practice exists, both parties should be able to examine the Company's practices over, at minimum, a three-year period, or the same duration of the parties' collective bargaining agreement.

The Union seeks this information to establish a past practice of allowing non-employee union representatives to attend the new employee orientation meetings. Although, strictly speaking, the issue to be presented to the arbitrator concerns the interpretation of two articles in the collective-bargaining agreement, evidence concerning the Respondent's past practice could well be relevant. To establish a past practice, a 3-year period is not unreasonable. Therefore, I cannot conclude that the time period is overly broad.

The Respondent also objected that the information request was unduly burdensome. In his December 9, 2020 reply, the Union's attorney stated:

> Your objection claims that this request is unduly burdensome. Under Board law, a party asserting that responding to relevant RFIs is unduly burdensome or oppressive must show that compliance with the request would seriously disrupt its normal business operations. *Safeway Stores v. NLRB*, 691 F.2d 953, 957 (10th Cir. 1982) (holding company's time and cost burden does not prevail over union requesting information); *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 363–364 (1983) (holding that, '. . .[T]he cost and burden of compliance ordinarily will not justify an initial, categorical refusal to supply relevant data.;); *NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1339-1340 (7th Cir. 1991) (holding that even a substantial time and money burden does not excuse duty to disclose); *West Penn Power Co. v. NLRB*, 394 F.3d 233, 245–246 (4th Cir. 2005) (reasonable efforts to obtain outside information is not an undue burden). Accordingly, please explain how compliance with this request would seriously disrupt normal business operations and provide supporting documentation.

Although the Board and courts have held that there are some acceptable limits on information requests that would otherwise entail an undue burden, the onus is on the employer to show that production of the data would be unduly burdensome, and to offer to cooperate with the union in reaching a mutually acceptable accommodation. *Mission Foods*, above. Considering the record as a whole, I cannot conclude that the Respondent has met this burden.

Moreover, the burden of formulating a reasonable accommodation rests on the employer. *Colorado Symphony Association*, 369 NLRB No. 122, slip op. at 1, fn. 3 (July 3, 2018). However, the record does not establish that the Respondent ever proposed an accommodation.

More specifically, the Respondent raised the unduly burdensome objection in its November 25, 2020 letter to the Union, but that letter did not offer to cooperate with the Union in reaching a mutually acceptable accommodation. The Respondent had a second opportunity to propose an accommodation when it replied to the Union's December 9, 2020 letter. However, neither that reply nor any other part of the record includes any accommodation proposed by the Respondent.

For all these reasons, I conclude that the Respondent has not established that the information request was overly or unduly burdensome.

Because the information described in complaint paragraph 7(a)(vii) consists of 7 different items, determining whether this information request is overly broad *in scope* requires an examination of each item individually. If a particular item is not relevant, then the information request is overly broad to that extent.

At the outset of this analysis, it may be noted that the Board does not pass on the merits of the grievance underlying the request. *United States Postal Service*, 337 NLRB 820, 822; (2002) *Certco Food Distribution Center*, 346 NLRB 1214, 1215 (2006).

Because the requested information pertains to meetings of bargaining unit employees[20] it is presumptively relevant. *Caldwell Mfg. Co.*, above; *CalMat Co.*, above. Therefore, the appropriate analysis involves determining whether the Respondent has rebutted the presumption of relevance. See, e.g., *Hondo, Incorporated d/b/a Coca-Cola Bottling Company of Chicago*, 311 NLRB 424 (1993).

In general, the Board applies a liberal discovery-type standard. *Brazos Electric Power Cooperative*, 241 NLRB 1016 (1979). Whether information must be produced depends upon whether or not there is "a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." *Daimler Chrysler Corp.*, 344 NLRB 772, 774 (2005), citing *Bohemia, Inc.*, 272 NLRB 1128 (1984)(internal quotation marks omitted). Therefore, the Respondent's rebuttal burden entails showing that the requested information will *not* "be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." This burden is significant because, under the Board's standard, even potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Postal Service*, 332 NLRB 635 (2000).

In its December 9, 2020 letter to the Respondent, the Union asserted that it needed this information to determine "whether the Company's actions at issue are consistent with its previous practice." Presumably, the "actions" in question are the same actions which gave rise to the grievance, the Respondent's exclusion of some non-employee union representatives from the orientation meetings it conducts for its new employees.

The Union, therefore, wished to examine the requested information to find out if the Respondent had allowed non-employee union representatives to attend such meetings. If so, the

20 It might be argued that, because these representatives are not *themselves* bargaining unit employees, the requested information does not "pertain to employees within the bargaining unit" and therefore is not entitled to a presumption of relevance. See, e.g., *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 258–259 (1994) However, for reasons discussed above, I would reject this argument. Bargaining unit employees attended the meetings and the subject of the grievance concerns their terms and conditions of employment, namely, whether they have the right under the collective-bargaining agreement to have non–employee union representatives present during their new employee orientation meetings.

Union could present the evidence to the arbitrator to support the argument that the Respondent deviated from past practice when it excluded the non-employee union representatives on August 6, 2020.

Therefore, my inquiry will focus on whether the requested information has potential or probable relevance to proving whether the Respondent allowed non-employee union representatives to attend new employee orientation meetings in the past. As discussed above, I begin the analysis presuming the sought information is relevant and placing the burden on the Respondent to show that it is not. In performing this analysis, I will consider separately the information listed to the right of each "bullet point."

First, the Union requested a "list of names of all employees who have attended each new employee orientation." Because the Union is seeking information which will establish whether or not the Respondent has allowed non-employee union representatives to attend the meetings, the names of all the employees who were present at each of the meetings seems of somewhat limited value. However, the Union could use this information to decide which employees to contact and ask about the presence of union representatives. With respect to this information, therefore, I conclude that the presumption of relevance has not been rebutted. Accordingly, I further conclude that the Respondent's failure to furnish it violated Section 8(a)(5) and (1) of the Act.

Second, the Union requested the date of each meeting. To establish a past practice of allowing non-employee union representatives to attend orientation meetings, the Union must show that the Respondent did so more than once. The requested information clearly is relevant. Therefore, I conclude that the Respondent's failure to furnish it violated Section 8(a)(5) and (1) of the Act.

Third, the Union seeks to know the names of the "steward(s) and/or Union agents(s) attended and/or presented." This requested information clearly is relevant because the Union seeks to prove the presence of union representatives in the past. Therefore, I conclude that the Respondent's failure to furnish it violated Section 8(a)(5) and (1) of the Act.

Fourth, the Union seeks the identity of the Respondent's representative present at each meeting. The information is obviously relevant because, if non-employee union representatives did attend a meeting, they likely did so because a member of Respondent's management allowed it. Therefore, I conclude that the Respondent's failure to furnish it violated Section 8(a)(5) and (1) of the Act.

Fifth, the Union asked for the number of authorization cards that were signed. However, it did not request to know the names of the employees who signed such cards, but only the number of signers. It strains the imagination to conceive of any reason why the number of employees signing authorization cards would provide any useful information about the presence of union representatives at a meeting. It also is difficult to conceive of how this number might lead to any relevant information. Therefore, with respect to this request, I conclude that the presumption of relevance has been rebutted.

Sixth, the Union requests sign-in sheets or other attendance records. This request overlaps the request for a list of names of the attendees. For the same reasons applicable to that request, I conclude the Respondent has not rebutted the presumption of relevance. Further, I conclude that the Respondent's failure to furnish this information violated Section 8(a)(5) and (1) of the Act.

Seventh, the Union requested the "Respondent['s] notes or communication from each orientation and are still in Respondent's possession." As discussed above, the complaint does not allege that this requested information is relevant except for the notes or communications which pertain to the Union. So limited, the requested information obviously is relevant. Notes and communications which are (1) about a new employee orientation meeting attended by bargaining unit employees and (2) which pertain to the Union might well include information about whether a non-employee union representative was allowed to attend.

To summarize, with respect to the Respondent's objection that the information request was overly broad, I conclude that it was overly broad only because it included a request for the number of employees who signed authorization cards. When this irrelevant request is trimmed away, the remainder is not overly broad in scope.

The Respondent's November 25, 2020 letter to the Union also stated that the Union already possessed the information sought because a union steward was present at each meeting. In his December 9, 2020 reply, the Union's attorney disagreed:

> Your objection is also inaccurate with respect to your claim that the requested information is within the Union's knowledge, possession, and control as new employee orientations are Company (not Union) meetings and the Union has no notes or records in its possession reflecting the information requested. Please provide all responsive information requested to the extent such records and information still exist.

The Respondent's December 16, 2020 answer to the Union's letter did not specifically address the Union's statement that it had no notes or records reflecting the requested information. The Respondent only stated that union stewards had been present at new employee orientation meetings since December 2018.

However, even if the union stewards had taken notes, and even if the Union still had such notes, it would not relieve the Respondent from the duty to furnish the requested information. The Respondent's records might well include relevant information not reflected in the stewards' notes.

Accordingly, I conclude that the Respondent had a duty to furnish the Union with any and all Respondent notes or communications from each orientation during the 3-year period on November 13, 2020, the date of the information request, but this duty is limited to those notes and communications pertaining to the Union and still in the Respondent's possession.

Further, I find that the Respondent did not furnish the Union with such notes and communications, and that the Respondent thereby violated Section 8(a)(5) and (1) of the Act.

Summary

The Respondent violated Section 8(a)(5) and (1) of the Act by delaying unreasonably in furnishing the Union with the requested information described in complaint paragraph 7(a)(i).

The Respondent did not violate the Act by failing and refusing to furnish the Union with the requested information described in complaint paragraph 7(a)(ii) because the request sought prearbitration discovery delving into the Respondent's strategy and preparations.

The Respondent likewise did not violate the Act by failing and refusing to furnish the Union with the requested information described in complaint paragraph 7(a)(iii) because the request sought prearbitration discovery delving into the Respondent's strategy and preparations.

The Respondent did not violate the Act by an unreasonable delay in furnishing the requested information described in complaint paragraph 7(a)(iv) because the Union already possessed this information at the time it made the request.

The Respondent did not violate the Act by failing and refusing to furnish the Union with the requested information described in complaint paragraph 7(a)(v) because the request sought prearbitration discovery delving into the Respondent's strategy and preparations.

The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the requested information described in complaint paragraph 7(a)(vi).

The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with portions of the requested information described in complaint paragraph 7(a)(vii) but did not violate the Act by its failure to furnish the Union with other portions. Specifically, the Respondent violated the Act by falling and refusing to furnish the Union with the following:

- A list of names of all employees who have attended each new employee orientation
- The date of each orientation
- Identify which steward(s) and/or Union agents(s) attended and/or presented
- Identify the Respondent representative present
- Any sign-in sheets or any other record(s) of attendance that may have been kept
- Any and all Respondent notes or communication from each orientation which pertain to the Union and are still in Respondent's possession.

The Respondent did not violate the Act by failing to furnish the Union with the number of authorization cards signed because that information is not relevant to the Union's performance of its duties as exclusive bargaining representative.

Conclusions of Law

1. The Respondent, Rev-A-Shelf, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, General Drivers, Warehousemen and Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act: All production employees, including truck drivers, employed by Respondent at its Louisville, Kentucky facility, but excluding all maintenance, mold shop, quality department, office/clerical professionals, guards, and supervisory employees as defined in the Act.

4. At all material times, the Union has been, and is, the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the employees in the unit described above in paragraph 3, and has been recognized as such by the Respondent.

5. The Respondent violated Section 8(a)(5) and (1) of Act by an unreasonable delay in furnishing the Union with information requested by the Union, which information was relevant to and necessary for the Union in the performance of its duties as exclusive bargaining representative of the employees described in paragraph 3 above.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information requested by the Union, which information is relevant to and necessary for the Union in the performance of its duties as exclusive bargaining representative of the employees described in paragraph 3 above.

7. The unfair labor practices described in paragraphs 5 and 6, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent did not violate the Act in any other manner alleged in the complaint.

Remedy

Having found that the Respondent engaged in certain unfair labor practices, I shall order that Respondent take remedial action, including posting the notice to employees attached to this decision as an Appendix.

The Respondent shall promptly furnish the Union with the following information, referred to above as Union Request No. 8: All statements, notes, or written communication made on July 23, 2020, July 30, 2020, July 31, 2020, August 5, 2020, and/or August 6, 2020 pertaining to the Union's respective visits to, or meeting(s) held at, the facility.

The Respondent shall furnish the Union with the following information about each new employee orientation meeting that took place during the 3-year period ending November 13, 2020: A list of names of all employees who attended the meeting; the date of the meeting; the names of all stewards and other union agents who were present at the meeting; the names of the Respondent's representatives attending the meeting; sign-in sheets or other records of attendance at the meeting; any and all of the Respondent's notes which pertain to the Union and which the Respondent still has in its possession.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended

ORDER[21]

The Respondent, Rev-A-Shelf, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Unreasonably delaying in furnishing the Union with requested information which is relevant to and necessary for the Union to perform its duties as exclusive bargaining representative.

(b) Failing and refusing to furnish the Union with requested information which is relevant to and necessary for the Union to perform its duties as exclusive bargaining representative.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Promptly furnish the Union with the following relevant and necessary information which the Union requested: For each new employee orientation meeting during the 3-year period ending November 13, 2020, a list of names of all employees who attended the meeting; the date of the meeting; the names of all stewards and other union agents who were present at the meeting; the names of the Respondent's representatives attending the meeting; sign-

21 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in sheets or other records of attendance at the meeting; any and all of the Respondent's notes which pertain to the Union and which the Respondent still has in its possession

(b) Within 14 days after service by the Region, post copies of the notice attached hereto as an Appendix,[22] in all places where notices to employees are customarily posted at the Respondent's Louisville, Kentucky, facility. The notices shall be posted by the Respondent and maintained for 60 consecutive days. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posted on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. March 9, 2022

Keltner W. Locke
Administrative Law Judge

22 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT unreasonably delay in furnishing the Union which represents our employees with requested information which in relevant to and necessary for the Union in the performance of its duties as exclusive bargaining representative.

WE WILL NOT fail and refuse to furnish the Union which represents our employees with requested information which in relevant to and necessary for the Union in the performance of its duties as exclusive bargaining representative.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL furnish the Union with certain information it requested which is relevant to and necessary the Union's performance of its duties as exclusive bargaining representative.

REV-A-SHELF COMPANY, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by

employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

John Weld Peck Federal Building, 550 Main Street Room 3003, Cincinnati, OH 45202-3271
Telephone: (513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-270793 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (513) 684-3733.